

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**HAROLD B. WILSON, and
GRACY SEDLAK,**

Plaintiffs,

v.

**JOSEPH FLETCHER, and
ORA THOMAS FLETCHER,**

Defendants.

CASE NO. 4:12CV3061

**MEMORANDUM
AND ORDER**

This matter is before the court on Plaintiffs' "Motion to Compel Answer and Sanctions," "Motion for Proof of Service and Motion for Hearing," "Motion for Default Judgment," and "Motion for Court Order to Serve Pleadings." (Filing Nos. [28](#), [30](#), [31](#), and [32](#).) In these Motions, Plaintiffs ask the court to direct the United States Marshals Service ("marshals service") to personally serve Defendant Joseph Fletcher with summons, and also order Defendants to respond to Plaintiffs' discovery requests.

A. Service on Joseph Fletcher

The record reflects the marshals service attempted to effect service on Joseph Fletcher by certified mail at the address provided by Plaintiffs. (Filing No. [29](#).) The certified mail was returned "unclaimed" on October 22, 2012. (*Id.* at CM/ECF p. 1.) The court cannot determine from the record why service on Joseph Fletcher was ineffective. However, the court notes that the address provided on the summons form is "816 G Ave.," while the address provided on the USM-285 form is "815 G Ave." (Compare Filing No. [22](#) at CM/ECF p. 1 to Filing No. [29](#) at CM/ECF p. 1.)

Federal Rule of Civil Procedure 4 requires that service of process be completed "within 120 days after the complaint is filed." [Fed. R. Civ. P. 4\(m\)](#). Here, the marshals

service's attempt to serve Joseph Fletcher, as directed by Plaintiffs, was ineffective. Without effective service of summons, this case cannot proceed against Joseph Fletcher.

On the court's own motion, Plaintiffs will be given an additional 45 days to properly serve Joseph Fletcher. Liberally construed, Plaintiffs have also asked the court to order the marshals service to determine Joseph Fletcher's whereabouts in order to personally serve him with a summons. However, such an order is unwarranted. It is Plaintiffs' duty to determine Joseph Fletcher's whereabouts, not the duty of the marshals service or the clerk's office. See [Gray v. Rose, 2009 WL 2132623 at *3 \(S.D. Ohio 2009\)](#), ("The fact that this defendant could not be effectively served with process at that address is chargeable to plaintiff, not to either the Clerk or the Marshal."); see also [Gustaff v. MT Ultimate Healthcare, 2007 WL 2028103 at *3 \(E.D.N.Y. 2007\)](#), ("The United States Marshals Service cannot investigate defendant's whereabouts, nor can the court. That is Plaintiff's responsibility.")

B. Discovery Requests

In Plaintiffs' Motions, Plaintiffs seek an order directing Defendants to respond to their discovery requests, and also an order sanctioning Defendants for their failure to respond to Plaintiffs' discovery requests. (See *generally* Filing Nos. [28](#), [30](#), and [31](#).) Shortly after Plaintiffs filed this action, the clerk's office delivered to Plaintiffs a copy of the court's General Order Number 2007-12. (See Docket Sheet; Filing No. [3](#).) This order states, "[n]o discovery in pro se civil cases assigned to a district judge shall take place until . . . a progression order is entered unless permitted by the court. Requests to engage

in discovery prior to the issuance of such an order must be made by motion.” (Filing No. [3](#) at CM/ECF p. 1.)

Here, the court has not entered a progression order. Therefore, sanctions against Defendants for failure to respond to Plaintiffs’ discovery requests are not warranted. In addition, to the extent Plaintiffs seek to engage in discovery prior to the issuance of a progression order, their request is denied.

IT IS THEREFORE ORDERED that:

1. Plaintiffs’ “Motion for Court Order to Serve Pleadings” (Filing No. [32](#)) is granted to the extent that it is consistent with this Memorandum and Order. As such, Plaintiffs will be given an additional 45 days in which to serve Joseph Fletcher with summons;
2. The clerk’s office shall send ONE summons form and ONE USM-285 form to each Plaintiff, together with a copy of this Memorandum and Order. Plaintiffs must, as soon as possible, complete and return one set of the forms to the clerk’s office. In the absence of the forms, service of process cannot occur;
3. Upon receipt of the completed forms, the clerk’s office will sign the summons form, to be forwarded with a copy of the Complaint to the marshals service for service of process. The marshals service shall serve the summons and Complaint without payment of costs or fees pursuant to Federal Rule of Civil Procedure 4(c)(3). Service may be by certified mail pursuant to Federal Rule of Civil Procedure 4 and Nebraska law in the discretion of the marshals service. The clerk’s office will copy the Complaint, and Plaintiff does not need to do so;
4. Plaintiff is hereby notified that failure to obtain service of process on Joseph Fletcher within 45 days from the date of this Memorandum and Order will result in dismissal of this matter without further notice as to Joseph Fletcher. Joseph Fletcher has 21 days after receipt of the summons to answer or otherwise respond to the Complaint;
5. The clerk’s office is directed to set a pro se case management deadline in this case with the following text: March 9, 2013: Check for completion of service of summons; and

6. Plaintiffs' "Motion to Compel Answer and Sanctions," "Motion for Proof of Service and Motion for Hearing," and "Motion for Default Judgment" are denied. (Filing Nos. [28](#), [30](#), and [31](#).)

DATED this 23rd day of January, 2013.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge

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